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No. 08-1315

IN THE

Supreme Court of the United States

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In their petition for a writ of *certiorari* (the "Petition"), Petitioners established that a writ of *certiorari* should be issued in this action. First,

Petitioners established that a significant split of authority exists over the standard for determining whether and when a plaintiff is on "inquiry notice" of a claim under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") for purposes of determining the commencement of the statute of limitations. Petitioners also established that the Third Circuit's decision below further exacerbated the split among the circuits.

Respondents' principal argument in opposition is that no disagreement exists among the circuits. Respondents further argue that "Petitioners do not show that any other circuit court would have decided this case differently." Respondents' arguments are without merit.

This Court recognized the existence of the significant split of authority when, on May 26, 2009, it granted a writ of *certiorari* from the Third Circuit's decision in *Merck & Co. v. Reynolds*, 129 S. Ct. 2432 (2009) ("*Merck*"), a case which presented substantially similar questions to those presented here. Indeed, here the Third Circuit reversed the District Court and purported to base its decision on its decision in *Merck*. Surprisingly, Respondents do not mention the grant of the *Merck* petition. There also can be no question that Respondents' claims would have been dismissed as time-barred under "inquiry notice" standards adopted by other circuits. For that matter, Respondents' claims would have been dismissed as time-barred had the Third Circuit applied the reasoning underlying the "inquiry notice" standard that it applied in *Merck*.

Thus, Petitioners' Petition is equally as compelling as Merck's and the Court may be required to address issues concerning the "inquiry notice" standard that

are not present in *Merck*. Given the substantial similarity between the issues addressed in this Petition and the *Merck* petition, Petitioners' request that, if this Petition is granted, the Court consolidate the arguments in the two actions pursuant to Supreme Court Rule 27.3.

Second, Petitioners established that a writ of *certiorari* should be issued because the Third Circuit's Opinion conflicts with the precedent established by this Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), concerning the standards by which a court determines the adequacy of a plaintiff's scienter allegations for purposes of Section 10(b). Respondents contend that the Third Circuit complied with *Tellabs* simply because it found that the complaint was "replete with allegations of scienter." Respondents are wrong. The Third Circuit indisputably failed, as did the District Court below, to undertake any scienter analysis, let alone the comparative analysis required by *Tellabs* to determine whether "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."

I. A GENUINE CONFLICT EXISTS AMONG THE CIRCUITS REGARDING "INQUIRY NOTICE"

The issuance of a writ of *certiorari* is appropriate where, as here, there is a significant split of authority among the Courts of Appeals. Petitioners established that, while the circuits all agree that "inquiry notice" can trigger the commencement of the limitations period for a Section 10(b) claim, there is significant disagreement over when "inquiry notice" exists and how "inquiry notice" is determined. Pet. 3-4. Peti-

tioners further established that, in *Merck*, the Third Circuit adopted an "inquiry notice" standard that deviated from the standards adopted by the other circuits (except the Ninth Circuit), and, in purporting to apply that approach to this case, further exacerbated the circuit split.

In response, Respondents erroneously contend that there is no split of authority regarding the "inquiry notice" standard. On May 26, 2009, this Court granted a writ of *certiorari* in *Merck* – the very case on which the Third Circuit purported to base its opinion in this case. Because the issues in *Merck* are substantially similar to the issues raised in this case, the issuance of a writ of *certiorari* in *Merck* resolves any debate concerning the existence of a significant circuit split regarding the "inquiry notice" standard. Respondents do not attempt to distinguish the principal questions presented here from those presented in *Merck*, nor do they explain why the issuance of a writ in this case is inappropriate in light of the issuance of the writ in *Merck*.[1]

Respondents also contend that their claims are not time-barred under any of the "inquiry notice" standards identified by Petitioners. Respondents are

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[1] We note that in *Trainer Wortham & Co. v. Betz*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489) ("*Betz*"), the Solicitor General filed an *amicus curiae* brief in which she reviewed the standards in various circuits and concluded that there is a significant circuit split. Brief for the United States, as *Amicus Curiae*, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (Apr. 2009) ("Amicus Br."), 13-18. Respondents also appear to take issue with the Solicitor General's conclusion. Resp. Br. 18-20. The Solicitor General's brief, which was filed one day before the Petition, noted that *Merck*, unlike *Betz*, may be an appropriate case for this Court to address the circuit split. Amicus Br. 18 n.6.

wrong. In the Third and Ninth Circuits, "inquiry notice" requires "storm warnings" of "culpable activity" consisting of evidence that defendants acted with scienter – that is, "some reason to suspect that defendants did not genuinely believe the accuracy of their statements" or that defendants engaged in "malfeasance" or "intentional impropriety." Pet. App. 17a; *see Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 878 (9th Cir. 2008), *pet. for cert. filed*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489); *In re Merck & Co. Sec., Deriv. & "ERISA" Litig.*, 543 F.3d 150, 166 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 2432 (2009). In all the other circuits, however, "inquiry notice" is triggered upon the existence of "storm warnings," which those courts define as information that indicates only the "possibility" of fraud that need not consist of evidence concerning each element of a plaintiff's claim. Rather, "storm warnings" exist when the plaintiff becomes aware of facts contradicting the defendant's prior statements. Pet. 3-4, 13-16. None of these circuits require evidence of the defendant's scienter to constitute "storm warnings." As Petitioners established, it is indisputable that the February 2001 FDA Disclosures (as defined in the Petition) – which were widely disseminated to the market by way of the FDA website and extensive analyst and media coverage – constituted "storm warnings" under the standard adopted by the circuits other than the Third and Ninth. Pet. 8-10, 18-20. Accordingly, under the standard adopted by a majority of the circuits, Respondents would have been on notice of "storm warnings" as of February 2001 – more than two years before they filed their complaint.

II. THIS ACTION PRESENTS A COMPELLING OPPORTUNITY TO ADDRESS THE CIRCUIT SPLIT CONCERNING "INQUIRY NOTICE"

The Petition and the *Merck* petition present two questions to the Court. First, the Court is being asked to determine whether "inquiry notice" requires the existence of "storm warnings" consisting of facts suggesting that defendant acted with scienter and, if so, what are the circumstances under which such facts exist. Second, the Court is being asked to determine when, in relation to the existence of "storm warnings," the limitations period commences. Both petitions present substantially similar issues and take substantially similar positions. Moreover, the facts and circumstances of this case make it a compelling vehicle to address these issues because the Court may be required to address issues not present in *Merck*.

In *Merck*, plaintiffs alleged that Merck violated the Exchange Act by intentionally mischaracterizing the findings of a study comparing the cardiovascular safety profile of Merck's drug, Vioxx, to a comparator drug, naproxen. The Third Circuit rejected Merck's contention that a warning letter from the FDA reprimanding Merck for misrepresenting the cardiovascular safety profile of Vioxx was sufficient to trigger "inquiry notice." *In re Merck*, 543 F.3d at 172. Specifically, the FDA criticized Merck's advocacy of the "Naproxen Hypothesis," which posited that the apparent increase in cardiovascular adverse events observed in patients taking Vioxx was attributable to the cardioprotective effects of naproxen rather than the harmful effects of Vioxx. According to the Third Circuit, the FDA warning letter was not sufficient

to constitute a "storm warning" because it did not suggest Merck's disbelief in the validity of the Naproxen Hypothesis. Rather, the Third Circuit held that evidence of Merck's disbelief in the Naproxen Hypothesis first surfaced in October 2003 when the Wall Street Journal reported that a study sponsored by Harvard University (the "Harvard Study") refuted the Naproxen Hypothesis. The Third Circuit concluded that plaintiffs' claims were not time-barred because they filed their complaint within months of the Harvard Study's publication.

Here, the February 2001 FDA Disclosures constitute "storm warnings" even if the Court concludes that "storm warnings" must consist of evidence that the defendant acted with scienter.

First, while Petitioners believe that the Third Circuit reached an incorrect conclusion in *Merck*, there can be no question that the February 2001 FDA Disclosures constitute "storm warnings" even under the Third Circuit's analysis in *Merck*. There is no principled difference between the revelations in the Harvard Study – which the Third Circuit held to be the disclosure that placed the *Merck* plaintiffs on notice of Merck's disbelief in the validity of the Naproxen Hypothesis – and the February 2001 FDA disclosures in the present action. In February 2001, the FDA disclosed on its website all the CLASS data, which contradicted Petitioners' earlier alleged misrepresentations about the CLASS results. Further, there was extensive public dissemination, through securities analysts and other media, of the FDA Advisory Committee's and FDA staff's refutation of Petitioners' Alternative Analysis (as defined in the Petition). Following the February 2001 FDA Disclosures, Pharmacia's stock price declined, according to

Respondents' expert, by a statistically significant amount. Pet. 9-10, 27. Thus, even under the Third Circuit's analysis in *Merck*, this information was sufficient to suggest that Petitioners did not believe the validity of the Alternative Analysis published in JAMA and, thereby, constituted "storm warnings" that triggered Respondents' "inquiry notice." In contrast, the Third Circuit's conclusion that "storm warnings" did not exist until the publication of the Washington Post article has no basis in fact, logic or the law and, indeed, is inconsistent with its analysis in *Merck*. As set forth in the Petition, nothing in that article addressed the veracity of Petitioners' belief in their prior statements about the results of CLASS. Moreover, the article itself was a belated discussion of the information revealed by the February 2001 FDA Disclosures and Pharmacia's stock price remained unchanged following the article's publication. Pet. 19-20.

Second, the February 2001 FDA Disclosures also constitute "storm warnings" under the approach advocated by the Solicitor General in her *amicus* brief in *Betz*. The Solicitor General expressed her view that notice of a defendant's scienter is a prerequisite to "inquiry notice" and identified circumstances under which information suggesting the falsity of a defendant's statements would suffice to put plaintiffs on notice of the defendant's scienter:

> To be sure, an innocent mistake may be inherently unlikely, so that information giving rise to a suspicion of falsehood will without more give rise to a suspicion of fraud. In particular, when a "representation is false for reasons likely to have been within the knowledge of the company when

> making it, investors upon learning of the falsity should smell the possibility of fraud."

Amicus Br. 11-12 (*quoting Law v. Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997)). Here, as even the Complaint alleges, the information underlying Petitioners' allegedly false representations was within Petitioners' knowledge. *See* JA:0249-51. Accordingly, under the Solicitor General's approach, the February 2001 FDA Disclosures constitute information suggesting Petitioners' scienter, and, therefore, were "storm warnings."

Because the February 2001 FDA Disclosures (which occurred over two years before Respondents filed their complaint) constitute "storm warnings" even if the Court requires evidence of scienter, the Petition presents the Court with a compelling opportunity to address the standard for determining when the limitations period begins to run in relation to the existence of "storm warnings." Specifically, certain circuits hold that a plaintiff is on "inquiry notice," thus triggering the limitations period, simply when the plaintiff becomes aware of facts constituting "storm warnings." Other circuits hold that the existence of "storm warnings" obligates a plaintiff to undertake a diligent investigation to ascertain its claims. If the plaintiff does not undertake a diligent investigation, the limitations period begins to run from the time the "storm warnings" occur. Still other circuits hold that the existence of "storm warnings" does not obligate a plaintiff to investigate, but that the limitations period runs when the plaintiff would have uncovered facts supporting a claim had it undertaken an investigation in response to the "storm warnings." Here, because Respondents undertook no investigation, their claims would be

time-barred under the first two approaches because their complaint was filed over two years from the February 2001 FDA Disclosures. Respondents' claims would be time-barred under the third approach, as well, because the February 2001 FDA Disclosures provided Respondents with the information forming the allegations set forth in their original complaints. Petitioners note, however, that no circuit adopting this third approach appears to have established any standard for determining its implementation. Accordingly, this case presents the Court with the opportunity to articulate the appropriate standard for determining when the limitations period commences in relation to "storm warnings," and, at the same time, to provide the necessary guidance as to its implementation.

The Petition presents additional issues that merit issuance of a writ of *certiorari*. Petitioners established that the Third Circuit's finding that the February 2001 FDA Disclosures were too complicated to put a "reasonable investor" on inquiry notice contradicts the fundamental premise of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) – that all information about a security, which is traded in an efficient market, is incorporated into the price of that security. Indeed, in order to avail themselves of the fraud on the market presumption of reliance, Respondents alleged that all information about Pharmacia securities, including the highly technical allegedly false statements in the JAMA article, was incorporated into Pharmacia's stock price. Respondents cannot have it both ways. They cannot, on the one hand, claim that they were defrauded on the basis of a scientific publication as to which reliance is presumed under *Basic*, yet, on the other hand, contend that they were not on notice of scientific information

rebutting Petitioners' publication, which was widely disseminated in the market, because it was "too technical." Further, the Third Circuit's holding is irreconcilable with the undisputed facts that Pharmacia's stock price declined following the February 2001 FDA Disclosures, but did not decline following the Washington Post article. The Third Circuit's disregard of the negative stock price reaction to the February 2001 FDA Disclosures is inconsistent with established law and with the Third Circuit's express holding in *Merck* that a stock price decline is indicative of a "storm warning." 543 F.3d at 167, 171; *see* Pet. 26-28.

III. THE THIRD CIRCUIT'S OPINION DISREGARDED THE *TELLABS* MANDATE

Petitioners established that a writ of *certiorari* should be granted to address the Third Circuit's failure to follow the mandatory framework, established in *Tellabs*, by which courts must analyze a complaint's scienter allegations in connection with a Section 10(b) claim. In response, Respondents erroneously assert that the Third Circuit "in fact followed *Tellabs* explicitly" because the Third Circuit found that the complaint, "'[w]hen examined as a whole,' was 'replete with allegations [of] scienter.'" Resp. Br. 30-31 (*quoting* Pet. App. 19a). *Tellabs*, however, expressly requires a court to engage in a "comparative evaluation" by considering "not only inferences urged by the plaintiff . . . but also competing inferences [of nonfraudulent intent] rationally drawn from the facts alleged." 551 U.S. at 314. It is indisputable that the Third Circuit, like the District

Court, conducted no such evaluation.[2] The Third Circuit's failure to perform the analysis required by *Tellabs* merits the grant of a writ of *certiorari*. *See* Pet. 28-34.

IV. IF A WRIT OF *CERTIORARI* IS GRANTED IN THIS CASE, THE COURT SHOULD CONSOLIDATE IT WITH *MERCK* FOR ARGUMENT

Petitioners respectfully submit that the issues raised by the *Merck* petition would be addressed more completely by the Court's simultaneous consideration of the issues raised by the Petition in the present case. Accordingly, if the Court grants Petitioners' Petition for a writ of *certiorari*, Petitioners respectfully request that the Court consolidate the arguments for the present case and for *Merck* pursuant to Supreme Court Rule 27.3.

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[2] For example, the Third Circuit found that (1) the February 2001 FDA Disclosures "only supported the view that there existed a legitimate dispute over scientific and statistical models," (2) "the transcript of the [FDA] Advisory Committee meeting explicitly supports a finding that the experts believed that the dispute between defendants and the FDA was a good faith, legitimate scientific dispute" and (3) "the Advisory Committee simply did not believe that anything untoward had occurred." Pet. App. 14a-15a, 17a. The Third Circuit refused, however, to assess the weight of these inferences of nonfraudulent intent against those urged by Respondents in evaluating the adequacy of Respondents' boilerplate scienter allegations. *See* Pet. 32-34.

CONCLUSION

For the reasons set forth above and in the Petition, Petitioners respectfully request that the Court grant Petitioners' Petition for a writ of *certiorari* and request for argument consolidation pursuant to Rule 27.3.

Respectfully submitted,

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